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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13
14

15 **MICHAEL ZELENY, an individual,**
16 **Plaintiff,**
17 **v.**
18 **GAVIN NEWSOM, an individual, in his**
19 **official capacity; XAVIER BECERRA, an**
20 **individual, in his official capacity; CITY OF**
21 **MENLO PARK, a municipal corporation;**
22 **and DAVE BERTINI, in his official**
23 **capacity,**
24 **Defendants.**

Case No. 3:17-cv-07357-RS (TSH)

**MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL ORDER
OF MAGISTRATE JUDGE [L.R. 72-2]**

Dept: Courtroom 3, 17th Floor
Judge: The Honorable Richard G.
Seeborg
Trial Date: None set
Action Filed: 12/28/2017

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1 Defendant California Attorney General Xavier Becerra seeks an order vacating a September
2 4, 2020 discovery order entered by the Honorable Thomas S. Hixson (ECF 140):

3 RELEVANT FACTUAL BACKGROUND

4 Plaintiff Michael Zeleny is in a long-running dispute with the City of Menlo Park about
5 Zeleny's desire to demonstrate with an unloaded firearm, ammunition, and a large screen with
6 potentially graphic images that are visible to passing drivers on Sand Hill Road. *See* ECF 99
7 (Second Am. Compl.), ¶¶ 24-186.¹ Attorney General Becerra was not involved in the dispute, but
8 was sued because Zeleny also seeks a declaration that California's prohibition on the open carry
9 of weapons is facially unconstitutional. *Id.* ¶¶ 104-09, 187-193, 225-29.

10 California law contains numerous exceptions to the general prohibition against openly
11 carrying firearms. One exception is for open carry "by an authorized participant in . . . a motion
12 picture, television or video production, or entertainment event." Cal. Penal Code §§ 26375
13 (handguns), 26405(r) (other guns). Zeleny alleges that his activities fall within this exception
14 because he filmed himself, and therefore was an "authorized participant" in a video production.
15 *See* ECF 99, ¶¶ 107-109, 113. The City of Menlo Park denies that Zeleny was an "authorized
16 participant" in a bona fide television or entertainment event. *Id.* ¶ 121. The Attorney General is
17 analyzing the precise relationship between Zeleny's assertion of the "authorized participant"
18 exception and the Complaint's facial constitutional challenges, but at the pleadings stage, the
19 Attorney General denied that "California Penal Code §§ 25510, 26375, and 26405 do not require
20 municipal approval of 'authorized participants' in an entertainment event or film or video
21 production" *See* ECF 100 Prayer for Relief B.

22 Though the Attorney General has not applied the "authorized participant" exception to
23 Zeleny, in discovery, Zeleny served interrogatories that sought the Attorney General's
24 interpretation of the term "authorized participant" in California Penal Code sections 26375 and
25 26405(r). *See* ECF 135-5 (Interrogatories 10-16), ECF 135-6 (Interrogatories 22-25).
26 Specifically, Zeleny asked:

27 _____
28 ¹ For the Court's convenience, all the docket items referred to in this motion are attached
to the declaration of John W. Killeen being filed concurrently.

1 INTERROGATORY NO. 10: Does the phrase “authorized participant” as used in
2 California Penal Code §§ 26375 and 26405(r) refer to a participant authorized by a
governmental body or agency?

3 INTERROGATORY NO. 11: If Your answer to Interrogatory No. 10 is in the
4 affirmative, identify the governmental bodies or agencies from which authorization is
required?

5 INTERROGATORY NO. 12: If Your answer to Interrogatory No. 10 is in the
6 affirmative, state all bases for your contention that the phrase “authorized
participant,” as used in California Penal Code §§ 26375 and 26405(r), refers to a
7 participant authorized by a governmental body or agency?

8 INTERROGATORY NO. 13: If your answer to Interrogatory No. 10 is in the
negative, state the persons or entities whose authorization is required in order for
9 California Penal Code §§ 26375 and 26405(r) to exempt the carrying of firearms from
California Penal Code §§ 26350 and 26405.

10 INTERROGATORY NO. 14: Do California Penal Codes §§ 26375 and 26405(r)
11 require that the “motion picture, television or video production” or “entertainment
event” itself be authorized in order to exempt participants from California Penal Code
12 §§ 26350 and 26405?

13 INTERROGATORY NO. 15: If your response to Interrogatory No. 14 is in the
affirmative, identify all persons or entities whose authorization of the “motion
14 picture, television or video production” or “entertainment event” is required in order
to exempt participants from California Penal Code §§ 26350 and 26405.

15 INTERROGATORY NO. 16: State all of the bases for Your response to
Interrogatory No. 14.

16 INTERROGATORY NO. 22: Is an individual who has a valid “entertainment
17 firearms permit” issued pursuant to Penal Code § 29500 an “authorized participant”
within the meaning of Penal Code §§ 26375 and 26405(r)?

18 INTERROGATORY NO. 23: State all facts supporting your response to the
19 preceding interrogatory.

20 INTERROGATORY NO. 24: State all facts supporting your contention that the
definition of “authorized participant” under Penal Code §§ 26375 and 26405(r) refers
21 to a person with an “entertainment firearms permit” issued pursuant to Penal Code §
29500.

22 INTERROGATORY NO. 25: Identify all documents bearing upon, supporting, or
23 reflecting the facts set forth in Your response to the preceding interrogatory.

24 *Id.* This dispute arose because Attorney General Becerra asserted that while interrogatories may
25 be used to discover facts, or the application of law to facts, they cannot be used to seek a party’s
26 interpretation of pure questions of law. *See* ECF 135 (summarizing the parties’ positions).

On September 4, the magistrate judge directed Attorney General Becerra to answer the identified interrogatories. *See* ECF 140. The magistrate judge viewed the interrogatories as seeking the application of law to fact, rather than pure legal interpretation, because:

All of these interrogatories are just asking variants of the same question: *Why do you contend that I am not an authorized participant?* In each rog, [Zeleny] points to something about his factual situation (no governmental approval, no approval by anyone else, no approval for the event, no entertainment firearms permit) and asks *is this the reason?* He is not asking pure questions of law because each interrogatory asks the AG to apply the law to the facts of this case.

Id. at 2.

ARGUMENT

“Rule 33 does not permit interrogatories directed to issues of ‘pure law’—i.e., abstract legal issues not dependent on the facts of the case.” Phillips & Stevenson, Rutter Group Practice Guide: Fed. Civ. Pro. Before Trial ¶ 11:1680 (The Rutter Group April 2020 Update); *see United States ex rel. Englund v. L.A. Cnty.*, 235 F.R.D. 675, 683 (E.D. Cal. 2006) (barring interrogatory seeking legal interpretation of statutory term); *Everest Nat’l Ins. Co. v. Santa Cruz Cnty. Bank*, No. 15CV02085BLFHRL, 2016 WL 6311876, at *4 (N.D. Cal. Oct. 28, 2016) (barring interrogatories seeking information about “abstract legal definitions or discussions entirely divorced from the factual context of this case”); *cf. Disability Rights Council v. Wash. Metro. Area*, 234 F.R.D. 1, 3 (D.D.C. 2006) (prohibiting requests for admission about specific terms in federal law). Despite the obvious relevance a question of pure law may have to the parties’ claims, the purpose of this rule is to protect parties from having to disclose attorney work product before they have fully formed their arguments. *Larson v. Trans Union, LLC*, No. 3:12-CV-05726-WHO, 2017 WL 1540710, at *1 (N.D. Cal. Apr. 28, 2017).

Here, the primary interrogatories at issue are:

INTERROGATORY NO. 10: Does the phrase “authorized participant” as used in California Penal Code §§ 26375 and 26405(r) refer to a participant authorized by a governmental body or agency?

INTERROGATORY NO. 14: Do California Penal Codes §§ 26375 and 26405(r) require that the “motion picture, television or video production” or “entertainment event” itself be authorized in order to exempt participants from California Penal Code §§ 26350 and 26405?

1 INTERROGATORY NO. 22: Is an individual who has a valid “entertainment
2 firearms permit” issued pursuant to Penal Code § 29500 an “authorized participant”
3 within the meaning of Penal Code §§ 26375 and 26405(r)?

4 The remaining interrogatories—11 through 13, 15 and 16, 23 through 25—are follow-up
5 questions to these three primary questions.

6 On their face, all three interrogatories seek the legal interpretation of statutory terms,
7 namely, the meaning of an “authorized participant.” The interrogatories do not ask the Attorney
8 General “how it applied these terms in the past, or what [the Attorney General] contends the
9 terms mean with respect to the claims at issue here (questions that would call for the application
10 of law to fact).” *Everest National Insurance Company*, 2016 WL 6311876, at *4. For good
11 reason—the Attorney General has not applied the “authorized participant” exception to Zeleny,
12 and Zeleny does not allege that the Attorney General had anything to do with the alleged
13 conspiracy described in the Complaint. As to the Attorney General, Zeleny seeks only a pure
14 legal interpretation untethered from the facts of his case against the Attorney General. Such a
15 pure legal interpretation is not the proper subject of written discovery.

16 Notably absent from the interrogatories is any mention of Zeleny or the facts of this case.
17 The magistrate judge attributed this absence to Zeleny’s strategic thinking, because Zeleny “was
18 smart enough to understand that the answer is probably not specific to him.” ECF 140 at 2. But
19 that only proves the Attorney General’s point—it is fair for Zeleny to seek the Attorney General’s
20 understanding of the law as applied to Zeleny, but it is not fair for Zeleny to seek a legal
21 interpretation of an answer that is “not specific to him”; the practical effect of such an
22 interrogatory is to force the Attorney General to prematurely disclose his attorney work product.²

23 The magistrate judge also determined that these interrogatories were proper contention
24 interrogatories because they are “variants of the same question: *Why do you contend that I am not*
25 *an authorized participant?*” ECF 140 at 2. The only way to reach this result is to rewrite
26 Zeleny’s interrogatories to ask what Zeleny himself did not ask. Zeleny did not ask, “do you

27 ² Another concern with compelling the Attorney General to issue a general interpretation
28 of a statute that is untethered from Zeleny’s specific case is that it other interested entities may
assert that the Attorney General is issuing an underground regulation without following standard
administrative procedures. Of course, if compelled to respond to these interrogatories, the
Attorney General would dispute such a claim.

1 contend that I am not an authorized participant? Why or why not?” or “do you contend that I am
 2 not an authorized participant because . . .” He just asked, “what is the legal meaning of this
 3 statute?,” which is an improper inquiry. *See Frieri v. Sysco Corp.*, No. 316CV01432JLSNLS,
 4 2017 WL 3387713, at *3 (S.D. Cal. Aug. 4, 2017) (“The Court is not in a position—or under
 5 obligation—to rewrite the interrogatories”).

6 Finally, the magistrate judge appeared to be persuaded by Zeleny’s argument that “[t]he
 7 State cannot reject Zeleny’s interpretation of the statute while also refusing to take a position on
 8 what the statute means.” ECF 135 at 2; *see* ECF 140 at 3. But the point of the rule against
 9 seeking pure legal interpretations is to protect parties from having to disclose attorney work
 10 product before they have developed, adopted, or discarded their arguments about how a statute
 11 should be interpreted. The Attorney General, like any other party, “is not required to write his
 12 brief on a motion for summary judgment in his responses to interrogatories.” *Larson*, 2017 WL
 13 1540710, at *1. Rather than Zeleny being treated unfairly because he may not see the Attorney
 14 General’s legal theories before summary judgment, it is the Attorney General who would be
 15 prejudiced if forced to prematurely disclose attorney work product.

16 The policy imperative against disclosing work product is especially cogent here, where the
 17 Attorney General is largely a bystander to the core dispute between Zeleny and Menlo Park. The
 18 Attorney General did not deny Zeleny a permit on the basis that Zeleny was not an “authorized
 19 participant” in a video production. While the definition of the term “authorized participant” may
 20 (or may not) be relevant to Zeleny’s facial attack on the constitutionality of the open carry
 21 statutes, it is certainly less relevant to those claims than to Zeleny’s claims against Menlo Park.

22 CONCLUSION

23 For these reasons, Attorney General Becerra respectfully respects that the Court vacate the
 24 magistrate judge’s September 4 order (ECF 140) and enter an order denying Zeleny’s request to
 25 compel further answers to interrogatories 10 through 16 and 22 through 25.

26 ///

27 ///

28 ///

1 Dated: September 16, 2020

Respectfully Submitted,

2 XAVIER BECERRA
3 Attorney General of California
4 ANTHONY R. HAKL
5 Supervising Deputy Attorney General

6 */s/ John W. Killeen*
7 NOREEN P. SKELLY
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12 *General Xavier Becerra*

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CERTIFICATE OF SERVICE

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.** No. **3:17-cv-07357 RS (NC)**

I hereby certify that on September 16, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF
MAGISTRATE JUDGE [L.R. 72-2]**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 16, 2020, at Sacramento, California.

Tracie L. Campbell
Declarant

/s/ *Tracie Campbell*
Signature

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